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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

CITY OF LOS ANGELES, Plaintiff and Respondent, v. PERSONAL ELECTRIC TRANSPORTS, INC., Defendant and Appellant.	B206682 (Los Angeles County Super. Ct. No. BS111767)

APPEAL from a judgment of the Superior Court of Los Angeles County, John Shook, Judge. Affirmed.

Anthony P. Locricchio for Defendant and Appellant.

Rockard J. Delgadillo, City Attorney, Richard M. Brown, General Counsel, Stanton J. Snyder and Dirk P. Broersma, Deputy City Attorneys, for Plaintiff and Respondent.

Personal Electric Transports, Inc. (PET) appeals from a judgment confirming an arbitration award against it. We find PET failed to file a timely petition to vacate the arbitration award, and the trial court did not abuse its discretion in refusing PET's request to extend the time for such petition. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

PET and the City of Los Angeles, acting by and through the Department of Water and Power of the City of Los Angeles (City), entered a loan agreement on March 10, 2003. The loan agreement provided that all disputes "shall be subject to binding arbitration . . . ." A dispute arose regarding breach of the promissory note, and an arbitration hearing was conducted on August 13, 2007, before three arbitrators.

A final arbitration award in the amount of $2,090,317.60 in favor of the City and against PET was issued on October 9, 2007. On October 31, 2007, the City filed a petition to confirm the arbitration award, which attached a copy of the final arbitration award. On November 24, 2007, the City's petition to confirm was personally served on Barbara Locricchio, PET's operating manager and the wife of PET's chief operating executive, Anthony Locricchio. A proof of service was filed with the court on November 28, 2007.

On January 15, 2008, PET filed an ex parte application for an extension of time to file a petition to vacate the arbitration award, arguing that such extension was necessary because PET had been unable to obtain a transcript of the arbitration proceedings. PET included declarations of its then-attorney John D. Guerrini, Anthony Locricchio, and Barbara Locricchio. According to Barbara Locricchio, she learned on December 20, 2007, that the cost of ordering a transcript was $759.50, and did not order one because she needed to obtain a loan. Barbara Locricchio was advised that the transcript would be ready January 16, 2008.

Anthony Locricchio averred that he was surprised when the arbitrators "could not or would not provide" a transcript. He claimed to have been hindered by the arbitrators' delay in responding to his request for a transcript and by the City's refusal to provide a transcript. Guerrini's supporting declaration indicated that he had requested the City stipulate to an extension of time, but that the City had denied the request.

The City opposed PET's ex parte application for an extension of time. Attached to its opposition was a declaration of Mayvenne Castillo, an administrative assistant to the court reporting agency that had provided a court reporter for the arbitration. Castillo averred that Barbara Locricchio called on December 17, 2007 to inquire about the cost of a transcript of the arbitration hearing held August 13, 2007. When informed the cost would be $759.50, Ms. Locricchio stated she did not wish to order a transcript. More than three weeks later, on January 10, 2008, Ms. Locricchio called back to order a transcript.

At a hearing on January 15, 2008, the court concluded: (1) the lack of a transcript was an insufficient basis to delay filing a petition to vacate; (2) PET could have filed a petition to vacate without such transcript; (3) PET failed to respond within 30 days of the City's petition to confirm as required by Code of Civil Procedure section 1290.6;[1] (4) although PET confirmed the cost of the transcript with the court reporting agency, PET elected to wait to order the transcript; and (5) neither equitable relief nor relief under section 473 was warranted. When asked about service of the petition to confirm arbitration, Guerrini responded, "I don't dispute that has been served."

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[1] Undesignated statutory citations are to the Code of Civil Procedure.

The court granted the petition to confirm. Judgment was entered February 15, 2008. PET appealed from the judgment confirming the arbitration award. PET filed neither a section 473 motion nor a petition to vacate the arbitration award.

DISCUSSION

PET argues that under section 473 or the court's inherent equitable power, the trial court should have granted PET an extension of time to file a petition to vacate the arbitration award. Additionally, for the first time, PET contends the City did not properly serve its petition to confirm the arbitration award. Finally, PET argues that several errors were made by the arbitrators. PET's arguments either have been forfeited or lack merit.

1. *PET Failed to File a Timely Petition to Vacate and Failed to Show the Trial Court Abused its Discretion in Denying PET's Requested Extension*

Pursuant to section 1288, a party has 100 days to file a petition to vacate an arbitration award. The 100-day period serves the goal of ensuring that "evidence is fresh and witnesses are available" for the trial court to make any necessary factual determinations. (*Eternity Investments, Inc. v. Brown* (2007) 151 Cal.App.4th 739, 746.) However, section 1288 applies only where no petition to confirm arbitration has been filed. In contrast, where a petition to confirm has been filed, section 1290.6 governs the time for filing a response. Section 1290.6 provides that an in-state responding party has 10 days to respond and an out-of-state responding party has 30 days. (§ 1290.6.) Absent such response, the allegations in the petition are deemed admitted. (*Coordinated Construction, Inc. v. Canoga Big "A," Inc.* (1965) 238 Cal.App.2d 313, 318.)

As explained in *DeMello v. Souza* (1973) 36 Cal.App.3d 79, 83, "[w]hen the party petitions the court to confirm the award before the expiration of the 100-day period, respondent may seek vacation or correction of the award by way of response only if he serves and files his response within 10 days after the service of

the petition (§ 1290.6) [or 30 days for out-of-state service]. Unless the response is duly served and filed, under section 1290[.6] the allegations of the petition are deemed to be admitted by respondent." (*Ibid*.; see also *Eternity Investments, Inc. v. Brown, supra*, 151 Cal.App.4th at p. 745 [response to petition to confirm must be filed 10 days after service of the petition or 30 days if the petition is served outside the state].) Thus, the trial court correctly concluded that PET had 30 days from October 31, 2007 -- the date the City filed its petition to confirm -- to file a response. By January 15, 2008, when PET filed its ex parte application for an extension, the deadline for filing its response had long since passed.

2. *The Trial Court Did Not Abuse Its Discretion in Denying PET an Extension Under Section 473 or the Courts Inherent Equitable Powers*

PET argues the trial court should have extended the 100-day time period under section 1288, pursuant to either section 473 or the court's inherent equitable powers. The overarching problem with this argument is that it ignores the 30-day limit in section 1290.6. But, even assuming for the sake of argument that the 100-day time period was applicable, as explained below, PET demonstrates no error in the denial of its request to extend that time period.

a. *Section 473*

Section 473 provides in pertinent part: "The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect. Application for this relief shall be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted, and shall be made within a reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken. . . . Notwithstanding any other requirements of this section, the court shall, whenever an application for relief is

made no more than six months after entry of judgment, is in proper form, and is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, vacate any (1) resulting default entered by the clerk against his or her client, and which will result in entry of a default judgment, or (2) resulting default judgment or dismissal entered against his or her client, unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect." (§ 473, subd. (b).)

The trial court did not abuse its discretion in denying relief under section 473. (*Lint v. Chisholm* (1981) 121 Cal.App.3d 615, 619 [a "motion to vacate a default and set aside judgment (§ 473) 'is addressed to the sound discretion of the trial court, and in the absence of a clear showing of abuse . . . the exercise of that discretion will not be disturbed on appeal'"].) First, the procedural requirements were not established: (1) PET provided no motion; (2) PET provided no copy of the pleading proposed to be filed; and (3) PET supplied no affidavit of an attorney attesting to his or her mistake, inadvertence, surprise or neglect.[2] Although both Guerrini and Locricchio filed declarations, the former concerned notice of the ex parte hearing and the latter concerned efforts to obtain a transcript of the arbitration. Second, the substantive requirement was not established because PET failed to show mistake, inadvertence, surprise, or excusable neglect. It is within the court's discretion to deny a 473 motion seeking relief from failing to file a petition to vacate where the basis of such motion was ignorance of the time period

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[2] PET's entire argument for relief under section 473 was as follows: "Any reasonable excuse for failing to file the petition to vacate timely can be excused by the court under CCP § 473(b), as long as the motion is filed no later than six months after the award. See, *Demello v. Souza*[, *supra,*] 36 Cal.App.3d 79. [¶] Moreover, the strong public policy in permitting cases to be heard *on their merits* certainly warrants consideration of PET's request in this case. There are some very significant issues about this arbitration that must be considered and ruled upon by the court."

to file a petition to vacate. (*Coordinated Construction, Inc. v. Canoga Big "A," Inc.*, *supra*, 238 Cal.App.2d at p. 320 [trial court correctly refused to grant section 473 motion where attorney admitted ignorance of law on time period for filing petition to vacate].)[3]

b. *Inherent Equitable Power*

The trial court may grant relief from the failure to timely file a petition to vacate under its inherent equitable power "only if, due to the fraud of the opponent or by his own mistake, the aggrieved party was deprived of a fair adversary hearing and was prevented from presenting his claim or defense, or as the authorities put it, if the fraud or mistake was 'extrinsic' [citations]." (*DeMello v. Souza, supra*, 36 Cal.App.3d at p. 85; see also *Eternity Investments, Inc. v. Brown, supra*, 151 Cal.App.4th at p. 746 [court may use equitable power to grant relief in case of extrinsic mistake or fraud].) Extrinsic mistake is where excusable neglect prevents a party from presenting a claim or defense and "'results in an unjust judgment, without a fair adversary hearing . . . .'" (*Kulchar v. Kulchar* (1969) 1 Cal.3d 467, 471, italics omitted.) PET identifies no excusable neglect either for its failure to file a response within 30 days or for its failure to file a petition within 100 days. That PET was unaware of the time period for filing a petition to vacate is not evidence of extrinsic mistake. (See *Janetsky v. Avis* (1986) 176 Cal.App.3d 799, 811 [attorney mistake will not provide the basis for relief under court's inherent

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[3] In its reply brief, PET argues that it was unnecessary to file "a fruitless CCP § 473 Motion." It appears that PET is not conceding that its motion would have no merit, but instead attempting to argue such a motion would have been futile because the court indicated that lacking the transcript was an insufficient basis for such motion. Contrary to PET's argument, the trial court did not foreclose a section 473 motion. The court stated, "you can file that." The court simply observed that PET could have filed a petition to vacate notwithstanding the fact that it had not obtained a transcript.

equitable power unless it is caused by party's adversary]; *Eternity Investments, Inc. v. Brown, supra*, 151 Cal.App.4th at p. 745 [no extrinsic mistake or fraud where party failed to file petition to vacate within 100 days].) PET fails to show any abuse of discretion in the court's denial of PET's requested extension. (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 981 [we review denial of equitable relief for abuse of discretion].)

3. *Service of City's Petition to Confirm*

On appeal, PET challenges the adequacy of the service of the petition to confirm. Significantly, in the trial court, PET stated it did not "dispute that [the petition to confirm] has been served." Additionally, when the trial court stated that there was "no issue as to whether or not the city has provided service of the various documents," PET's counsel agreed. Moreover, any failure to properly serve PET with the petition to confirm would have affected only the 30-day time limit under section 1290.6, not the 100-day limit under section 1288. As PET failed to file a petition to vacate within 100 days after the final arbitration award, it cannot assert grounds to vacate. (*Eternity Investments, Inc. v. Brown, supra,* 151 Cal.App.4th at p. 742 [because defendants did not bring a timely petition or response to correct or vacate the award, the trial court had no choice but to disregard defendants' challenge and "'confirm the award as made.'"].)

4. *Alleged Misconduct by Arbitrators*

PET has forfeited its contention that the arbitrators committed numerous errors because it failed to file a petition to vacate the arbitration award. As explained in *Knass v. Blue Cross of California* (1991) 228 Cal.App.3d 390, 395: "Permitting a party to wait until after judgment [confirming an arbitration award] to challenge an award would undermine the purpose of arbitration proceedings -- to resolve disputes quickly. The requirements that a petitioner challenge an award within the 100-day limit 'places a burden upon those who would attack the award

to act promptly or acquiesce in its enforcement.'" "An appeal of the judgment confirming the award may not be used to circumvent the prescribed time allowed to petition for vacation or correction of an award." (*Id*. at pp. 395-396; see also *Louise Gardens of Encino Homeowners' Assn., Inc. v. Truck Ins. Exchange, Inc.* (2000) 82 Cal.App.4th 648, 660 [a party "cannot avoid the consequences of its failure to file a timely petition to vacate by appealing from the postconfirmation judgment"].)

DISPOSITION

The judgment is affirmed. The City shall have its costs on appeal.

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MANELLA, J.

We concur:

WILLHITE, Acting P. J.

SUZUKAWA, J.